MOTION FILED
APR 2 1983

No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITIONER, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland 21202

J. LAMAR SHELLEY
City Attorney
48 North Macdonald Street
Mesa, Arizona 95201

JOHN W. WITT
City Attorney
202 C Street
City Administration Building
San Diego, California 92101

(Attorneys continued on inside front cover)

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina
29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California 94102

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

MARVA JONES BROOKS
City Attorney
Department of Law
2000 Fulton National Bank Bldg.
Atlanta, Georgia 30303

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111

DOUGLAS N. JEWETT
City Attorney
Tenth Floor, Law Department
Municipal Building
Seattle, Washington 98104

ANALESLIE MUNCY
City Attorney
1500 Marilla, 7 BN
Dallas, Texas 75201

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma
73102

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York
10007

WILLIAM H. TAUBE
Corporation Counsel
Indiana Avenue and Oak Street
Kankakee, Illinois 60901

WILLIAM I. THORNTON, JR.
City Attorney
101 City Hall Plaza
Durham, North Carolina 27701

MAX P. ZALL
City Attorney
City & County Building
Denver, Colorado 80202

CHARLES S. RHYNE,
Counsel of Record
JOAN L. KAYAGIL
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

April 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Institute of Municipal Law Officers [NIMLO] moves the Court for leave to file the attached brief as amicus curiae in support of the Petitioner, Norfolk Redevelopment and Housing Authority. The petitioner has consented to the filing of the brief, but the respondent has withheld consent. These letters granting and withholding consent, respectively, have been lodged with the Clerk.

NIMLO submits that its brief can assist the Court in determining whether state rules and regulatory procedures governing the relationship between utility companies and

local governmental entities have been nullified, in the context of federally funded projects, by Congress in enacting the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* (1976). NIMLO's interest in this issue is set out in the Interest of the Amicus Curiae section of the attached brief. The brief analyzes the development and status of state common law rules defining the responsibilities of utility companies that, with the permission of state and local governments, occupy and use public rights-of-way in the conduct of their business. It also considers the nature of the interests involved in the provision of relocation assistance pursuant to the federal statute and the fiscal concerns of local governments, which must make difficult decisions in promoting the public health and welfare.

Because of the widespread adoption of legislation conforming with the Uniform Relocation Act, and the general reliance on a state rule that utilities are responsible for their own costs in relocation, this case is of nationwide importance, and, we submit, the attached amicus brief will assist the Court in evaluating the national impact of the decision in this case.

The motion and the brief *amicus curiae* are signed by the officers and trustees of NIMLO, as the authorized legal counsel of their governments and, pursuant to NIMLO's Constitution, in their capacities as representatives of the NIMLO membership. We urge the Court to grant NIMLO leave to file the attached brief as amicus curiae.

Respectfully submitted,

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland 21202

J. LAMAR SHELLEY
City Attorney
48 North Macdonald Street
Mesa, Arizona 95201

JOHN W. WITT
City Attorney
202 C Street
City Administration Building
San Diego, California 92101

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina
29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California 94102

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

MARVA JONES BROOKS
City Attorney
Department of Law
2000 Fulton National Bank Bldg.
Atlanta, Georgia 30303

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111

DOUGLAS N. JEWETT
City Attorney
Tenth Floor, Law Department
Municipal Building
Seattle, Washington 98104

ANALESLIE MUNCY
City Attorney
1500 Marilla, 7 BN
Dallas, Texas 75201

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma
73102

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York
10007

WILLIAM H. TAUBE
Corporation Counsel
Indiana Avenue and Oak Street
Kankakee, Illinois 60901

WILLIAM I. THORNTON, JR.
City Attorney
101 City Hall Plaza
Durham, North Carolina 27701

MAX P. ZALL
City Attorney
City & County Building
Denver, Colorado 80202

CHARLES S. RHYNE,
Counsel of Record
JOAN L. KAYAGIL
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

April 1983

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. BECAUSE OF THEIR UNIQUE NATURE, UTILITIES MAY BE SUBJECT TO SPECIAL STATE COMMON LAW RULES AND REGULATORY PROCEDURES, WHICH ARE TO BE DEEMED APPLICABLE UNLESS MODIFIED BY CONTRACT OR EXPRESS LEGISLATIVE ACTION 5

A. Common law mandates that respondent, C & P Telephone Company, pay its own costs for relocation of its facilities from public rights-of-way 5

B. The ratemaking process is a sufficient and preferable means through which utilities may be allowed to recover extraordinary expenses for relocation 8

C. A determination that state law and regulations should be modified may be accomplished only through contract with or other clear action by an appropriate legislative authority 10

II. THERE HAS BEEN NO LEGISLATIVE ACTION THAT EXPRESSLY OR IMPLIEDLY ABROGATES THE COMMON LAW RULES AND CONTRACT PROVISIONS GOVERNING THE RELATIONSHIPS AMONG THE PARTIES, CITY AND H.U.D. IN THIS CASE, OR THAT WOULD SUPPORT THE IMPOSITION OF SIGNIFICANT FINANCIAL BURDENS ON LOCAL GOVERNMENTS NATIONWIDE 11

Page

A. Congress has not expressed an intention to impose the extraordinary costs of utility relocations on states and their political subdivisions 12

B. Subsequent congressional actions and policy reasons are contraindicative to the extension of relocation benefits to utility companies 15

CONCLUSION 18

APPENDIX, SUMMARY OF NIMLO MEMBERSHIP SURVEY 1a

TABLE OF AUTHORITIES

Cases: **Page**

Artesian Water Co. v. State Dept. of Highways & Transportation, 330 A.2d 432 (Super. Ct.), *affirmed as modified*, 330 A.2d 441 (Del. 1974) 15, 16

Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu, 674 F.2d 298 (4th Cir. 1982) 12

Commonwealth v. VEPCO, 211 Va. 758, 180 S.E.2d 675 (1971) 8

Connecticut Railway and Lighting Co. v. New Britain Redevelopment Comm'n, 161 Conn. 234, 287 A.2d 362 (1971) 6

Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980) 8, 12

Creative Displays, Inc. v. South Carolina Highway Dept., 272 S.C. 68, 248 S.E.2d 916 (1978) 15

Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812) 13

Michigan Bell Telephone Co. v. City of Detroit, 106 Mich. App. 690, 308 N.W.2d 608 (1981) 6

Minnesota Gas Co. v. Public Services Comm'n, 523 F.2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) 9

Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980) 5, 6

National League of Cities v. Usery, 426 U.S. 833 (1976) 2

Page

New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905) 7

Newport Electric Corp. v. Redevelopment Agency of Newport, 116 R.I. 22, 351 A.2d 590 (1976) 11

Pacific Telephone and Telegraph Co. v. Redevelopment Agency, 75 Cal. App.3d 957, 142 Cal. Rptr. 584 (1977) 6

Pacific Telephone and Telegraph Co. v. Redevelopment Agency of Glendale, 87 Cal. App.3d 296, 151 Cal. Rptr. 68 (1978) 10

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 13, 14

Potomac Electric Power Co. v. Fugate, 211 Va. 745, 180 S.E.2d 657 (1971) 7

Rizzo v. Goode, 423 U.S. 362 (1976) 2

Robert C. Herd & Co., Inc. v. Krawill Machinery Corp., 359 U.S. 297 (1959) 13

Shaw v. Merchants' National Bank of St. Louis, 101 U.S. 557 (1880) 13

Shepard v. Dept. of Community Corrections, 293 Or. 191, 646 P.2d 1322 (1982) 17

Tennyson v. Gas Service Co., 506 F.2d 1135 (10th Cir. 1974) 9

Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis, 555 S.W.2d 29 (Mo. 1977) 7

Western Union Telegraph Co. v. Tarrant County, 450 S.W.2d 763 (Tex. Civ. App. 1970) 7

Statutes: **Page**

District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. 92-495, 86 Stat. 812 (Oct. 14, 1972) 17

Federal-Aid Highway Act of 1958, 23 U.S.C. § 123 (1976) 15

Johnson Act, 28 U.S.C. § 1342 (1976) 9

Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.* (1976) ..... *passim*

§ 4602 12

§ 4621 11

VIRGINIA CODE:
§ 36-55. 25 (1982) 6

§§ 56-234,-235 (1950) 8

§ 56-458 (1950) 7

§ 56-460 (1950) 7

Miscellaneous:

115 Congressional Record 31,553 (1969) (statement of Sen. Muskie) 10

H. Rep. 91-1656, reprinted in 1970 U.S. Code Cong. & Ad. News 5850 12

International City Management Assoc., The Municipal Year Book 1982 (1982) 15

12 McQuillin, Municipal Corporations (3d ed. 1970) 5

Page

J. Moore, W. Taggart, A. Vestal & J. Wicker, Moore's Federal Practice (1982) 9

4 Nichols, Eminent Domain (3d ed.) 6

Schell and Sparks, "Public Participation in the Regulation of Utilities by the Virginia State Corporation Commission: How the Commission Makes Public Policy While It Makes Rates," 18 Wm. & Mary L. Rev. 73 (1976) 8, 9

Sipes and McCoid, "Recovery of Consequential Damages in Eminent Domain," 48 Va. L. Rev. 437 (1962) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2332

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36 on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. These member local governments operate NIMLO through their chief legal officers, variously called city or county attorney, corporation counsel, city solicitor or law director and other titles, with each member local government having one vote on all actions which are cast by the organization.

Local government attorneys who participate in NIMLO advise the members of their governments' legislative and regulatory bodies in many of the legal aspects of the governments' operations, including regulation of public rights-of-way pursuant to statute or charter, compliance with prerequisites in seeking federal financial assistance for contemplated projects, and the exercise of eminent domain powers and consequent proceedings in condemnation. These attorneys also represent their municipalities in actions instituted against those governments as a result of the implementation of policies and procedures established with respect to these governmental functions. The City of Norfolk, Virginia, which may become responsible for making any payments due respondent if the Fourth Circuit decision is upheld, is a member of NIMLO.

This Court refused to countenance undue federal legislative and judicial interference with important functions of local government in such cases as *National League of Cities v. Usery,* 426 U.S. 833 (1976), and *Rizzo v. Goode,* 423 U.S. 362 (1976). The members of NIMLO suggest that to interpret the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 as overriding or preempting state and local law pertaining to the relocation of utilities occupying public rights-of-way is also an improper exercise of federal judicial power. Absent a clear legislative expression that such an application of the Uniform Relocation Act was intended, abrogation of state common law, especially in light of the fact that business interests of utility companies may be adequately protected by alternative means unavailable to most businesses, constitutes an unwarranted strain on federal-state relations and imposes impractical fiscal burdens on the efforts of local governments to advance the public health and welfare. The deple-

tion of available monies resulting from a required reimbursement to utility companies for discontinuing the gratuitous use of public rights-of-way would increase the hardship on local governments seeking to finance public improvements. This effect would be contrary to the public interest, and the National Institute of Municipal Law Officers suggests that such an interpretation of the Uniform Relocation Act also would be violative of accepted standards of statutory construction, as enunciated by this Court. Consequently, NIMLO urges reversal of the judgment rendered in this case by the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition for a Writ of Certiorari is adopted by the National Institute of Municipal Law Officers for purposes of this brief amicus curiae.

SUMMARY OF ARGUMENT

The general common law responsibility of utility companies to pay their own costs when required to relocate from public rights-of-way is clearly established by many state court decisions. According to a long-standing rule of construction, absent express legislative abrogation of this principle, the common law rule continues to govern the relationships between utilities and local governmental entities. The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 does not constitute a sufficiently clear statement of congressional intent to override common law rules governing the rights and responsibilities of utility companies in their occupation and use of public rights-of-way.

ARGUMENT

The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 ["URA" or "Uniform Relocation Act"], 42 U.S.C. §§ 4601 *et seq.* (1976), establishes a policy of reimbursing persons for their costs of relocating homes and businesses displaced as a result of projects funded using federal monies. Traditional well-known common law rules applicable in many states, which were established long before the enactment of the URA, make utility companies occupying public rights-of-way responsible for the costs of moving their equipment and facilities from those rights-of-way at the request of the appropriate governmental unit. Typically the expenses of relocation are recouped by utility companies through rates established after proper presentation to and consideration by regulatory and ratemaking authorities. Any modification of the standard operation of common law rules and regulatory processes now governing the relationships between utility companies, state and local governments, and the public may be accomplished only by legislative action that clearly intends such a modification.

Despite the well-known common law practices, Congress did not expressly address the unique status of utility companies in occupying public rights-of-way in its extensive consideration of the Uniform Relocation Act. The URA, which has a clear and laudable goal of protecting individuals and small businesses from being unfairly, and perhaps irreversibly, damaged by forced relocations, does not clearly extend its concern or the largess it represents to such public service enterprises as utility companies, which already enjoy special privileges bestowed because of their unique nature. To read such an intent into the URA, and therefore into all state legislation subsequently adopted in

conformance with the URA, defies traditional common law rules and will greatly burden efforts, recognized as important in other federal legislation, to utilize limited federal and state funds in the manner of greatest benefit to the health and welfare of the public. The decision of the Fourth Circuit below should be reversed, and state law should prevail unless and until Congress itself speaks clearly to the issue raised in a manner consistent with the United States Constitution. This it has so far failed to do.

I. BECAUSE OF THEIR UNIQUE NATURE, UTILITIES MAY BE SUBJECT TO SPECIAL STATE COMMON LAW RULES AND REGULATORY PROCEDURES, WHICH ARE TO BE DEEMED APPLICABLE UNLESS MODIFIED BY CONTRACT OR EXPRESS LEGISLATIVE ACTION.

A. Common law mandates that respondent, C & P Telephone Company, pay its own costs for relocation of its facilities from public rights-of-way.

Generally, utilities occupying public rights-of-way have a common law duty to relocate their facilities at their own expense whenever public convenience or necessity so require. *See,* 12 McQuillin, *Municipal Corporations,* § 34.74a (3d ed. 1970); *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency,* 101 Idaho 30, 607 P.2d 1084 (1980), and cases cited therein. The common law rule applies whether a utility's presence in the rights-of-way results from the grant of an easement, a permit or a franchise:

> "Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, *expressly or by im-*

> *plication,* in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the *clear* import of the language used in a particular statute."

Connecticut Railway and Lighting Co. v. New Britain Redevelopment Comm'n, 161 Conn. 234, 240, 287 A.2d 362, 365 (1971) (emphasis added) (quoting 4 NICHOLS, EMINENT DOMAIN § 15.22 (3d ed.)).

The common law rule has developed from a recognition that streets are regulated in the public trust through the exercise of the police power of a state or local government. *See, Michigan Bell Telephone Co. v. City of Detroit,* 106 Mich. App. 690, 308 N.W.2d 608 (1981), and cases cited therein. In removing urban blight and slums through redevelopment, a governmental entity is acting through its police power, and vacating streets to accommodate a redevelopment project is a proper governmental[1] use of the streets. *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency,* 101 Idaho 30, 607 P.2d 1084 (1980).

---

[1]In fact, the Virginia Legislature has expressly recognized redevelopment and the provision of housing for low- and moderate-income persons as a governmental function in furtherance of which the state and its cities may properly exercise their police powers. VA. CODE § 36-55.25 (1982). Even were such activity to be deemed proprietary in nature, the distinction has been labeled "of dubious value" and rejected as a basis for allowing recovery of a utility's relocation costs. *Pacific Telephone and Telegraph Co. v. Redevelopment Agency,* 75 Cal.App.3d 957, 142 Cal.Rptr. 584, 591 (1977); *contra, Michigan Bell Telephone Co. v. City of Detroit,* 106 Mich. App. 690, 308 N.W.2d 608 (1981).

Furthermore, while the authority of a telephone company to occupy and use public rights-of-way in Virginia is granted by state statute, VA. CODE § 56-458 (1950), such use is expressly subject to "such terms, regulations and restrictions as may be imposed by the [municipal] corporate authorities . . . ." VA. CODE § 56-460 (1950). Even absent an express reservation of the right to impose subsequent conditions on a utility's use of a public right-of-way, the utility's occupancy would be deemed subject to future regulations required for the public health and welfare. *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans,* 197 U.S. 453 (1905).

Permission to occupy and use the public rights-of-way in Virginia does not constitute an interest in land protected by any requirement that compensation be made when relocation is necessitated. *See, Potomac Electric Power Co. v. Fugate,* 211 Va. 745, 180 S.E.2d 657 (1971). Where a utility enjoys the use of public rights-of-way subject to unspecified conditions relating to the public benefit, as determined by governmental authorities, the utility "should not be heard to complain when the progress of a community requires that the use of the street involved be terminated." *Western Union Telegraph Co. v. Tarrant County,* 450 S.W.2d 763 (Tex. Civ. App. 1970) (relocation of city's utilities required for solely aesthetic purposes); *see also, Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis,* 555 S.W.2d 29 (Mo. 1977).

B. The ratemaking process is a sufficient and preferable means through which utilities may be allowed to recover extraordinary expenses for relocation.

Commonly, a state or local regulatory entity is delegated responsibility for establishing the rates that may be charged to utility customers. The ratemaking function is typically a complex matter, requiring consideration of both a great amount of technical testimony and the best interests of the consumers. *See, Consumers Power Co. v. Costle,* 615 F.2d 1147, 1150 (6th Cir. 1980). As in Virginia, the interests of the utility may be protected by a requirement that the established rates be "just and reasonable,"[2] which allows for expenses and a fair rate of return.[3] In practice, the interests of the utility are much better protected in the ratemaking process than are the interests of the public. As has been observed of the Virginia process:

> Utility rate cases offer a strange amalgam of adversarial and inquisitorial fact-finding formats. The public utilities, with their extensive legal staffs and expert witnesses, participate before the State Corporation Commission as fully prepared adversaries. Any student of regulation in Virginia who attends any of the major utility rate cases could only conclude that the preparation and presentation of the utilities is impressive, complete and compelling.

Schell and Sparks, "Public Participation in the Regulation of Utilities by the Virginia State Corporation Commis-

---

[2]VA. CODE ANN. §§ 56-234 to-235 (1950).

[3]*Commonwealth v. VEPCO,* 211 Va. 758, 766, 180 S.E.2d 675, 681 (1971).

sion: How the Commission Makes Public Policy While It Makes Rates," 18 WM. & MARY L. REV. 73, 78 (1976).[4]

The integrity of the established ratemaking procedures in Virginia has been improperly disturbed by the Fourth Circuit as a result of its decision below. Similarly to the area of taxation administration, the area of state regulation of public utilities is to be treated with special care by the federal courts, as is evidenced by the Johnson Act, 28 U.S.C. § 1342 (1976). 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.206 (1982); *Minnesota Gas Co. v. Public Service Comm'n,* 523 F.2d 581 (8th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976). Thus, what respondent has so far succeeded in doing, contrary to the spirit of the Johnson Act, is to exacerbate federal-state relations through urging a finding of indirect and implied federal powers to overrule the state and local ratemaking process.[5] Since the case here for review by this Court does not present any allegation that a ratemaking authority had denied respondent due process of law, or that any rate-setting order had been repugnant to the United States Constitution, the Court should refuse to allow state law and regulatory processes to be abrogated by an unclear congressional action, that has been interpreted so as to be damaging and contradictory to other federal policies.

---

[4]The authors also note that even where the public mounts the best effort possible to present the consumer viewpoint in state ratemaking proceedings, utilities generally can outmatch these efforts. In addition, because public resources are so limited, commitment of those resources to one rate case, in effect, diverts the resources from other rate cases. The authors point out that while such concerns are indicated in rate cases involving utilities and the state, the burden is even heavier in claims pitting the utilities against local governments. 18 WM. & MARY L. REV. at 82-86.

[5]*See, Tennyson v. Gas Service Co.,* 506 F.2d 1135 (10th Cir. 1974).

C. A determination that state law and regulations should be modified may be accomplished only through contract with or other clear action by an appropriate legislative authority.

The determination that the burden for relocation costs should be shifted from a utility's rate payers to other state and federal taxpayers is properly a legislative matter. Such was the finding in a California case involving a state law similar to the Uniform Relocation Act, *Pacific Telephone and Telegraph Co. v. Redevelopment Agency of Glendale,* 87 Cal. App.3d 296, 151 Cal. Rptr. 68 (1978). In that case, the court held that the intent to change the common law rule regarding utility relocation expenses cannot be inferred from broad general definitions. While the broad statement of policy declared as the basis for the URA reflects a concern for the allocation of consequential losses in eminent domain, the unusual requirement that utilities be reimbursed for expenses incurred in moving from public rights-of-way was never addressed by the federal legislators and involves economic considerations beyond the reach of the judiciary.[6]

---

[6]In fact, the allocation of consequential damages for relocation under the URA is intended to ease the impact of required relocation on the "people who are least able to absorb the burden of these Federal programs." 115 CONG. REC. 31,533, 31,534 (1969) (statement of Sen. Muskie). The allocations clearly made under the URA presumably reflect a belief that the governmental entities can bear the costs more easily than the displaced individuals or businesses. However, with respect to utility relocations, there has been no consideration as to whether the governmental entities could pass on this increased expense to the public more easily than the utility could pass the expense on to its ratepayers. In fact, the ability of the governmental entity to distribute the expense may be impaired by not uncommon taxation and debt limitations to which the entity may be subject.

7

Where there exists the power to contract, a modification of the common law also may be effected by express provisions within a contract between a utility and the governmental entity. Such was the case in *Newport Electric Corp. v. Redevelopment Agency of Newport,* 116 R.I. 22, 351 A.2d 590 (1976), in which the agency was ordered to pay the utility's relocation costs.[7] In cases having similar results, clear legislative intent can be found in two ways: the delegation of the power to contract, and the actual decision to contract. Therefore, the common law principle has been subjugated to contrary legislative action.

II. THERE HAS BEEN NO LEGISLATIVE ACTION THAT EXPRESSLY OR IMPLIEDLY ABROGATES THE COMMON LAW RULES AND CONTRACT PROVISIONS GOVERNING THE RELATIONSHIPS AMONG THE PARTIES, CITY AND H.U.D. IN THIS CASE, OR THAT WOULD SUPPORT THE IMPOSITION OF SIGNIFICANT FINANCIAL BURDENS ON LOCAL GOVERNMENTS NATIONWIDE.

The portion of the Uniform Relocation Act that is applicable in this case has the purpose of assuring that displaced persons " . . . shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 42 U.S.C. § 4621 (1976). With respect to consequential damages in eminent domain, expense allocation has been recommended where the governmental activity is necessary to promote the public health and welfare, but resultant expenses are too burdensome to

[7]However, this case involved the relocation of power lines underground, and the costs awarded to the utility were computed according to the reasonable value of the work, less sums that would have been expended for the relocation of an overhead system.

be incurred by the injured individuals.[8] Such a concern is not valid when directed at utility companies where, as shown above, the expenses for relocation are expected and incurred willingly by virtue of accepting permission to occupy public rights-of-way, and reimbursement of expenses is made through the ratemaking device.

A. Congress has not expressed an intention to impose the extraordinary costs of utility relocations on states and their political subdivisions.

The legislative history, as argued by petitioner and discussed by the Fourth Circuit below, *Chesapeake and Potomac Telephone Co. of Virginia v. Landrieu,* 674 F.2d 298 (4th Cir. 1982), does not indicate that Congress considered the status of public or quasi-public businesses, such as utility companies, in enacting the Uniform Relocation Act. This fact, where coupled with indications that Congress did not intend the URA to create any rights or liabilities, 42 U.S.C. § 4602 (1976); *Consumers Power Co. v. Costle,* 615 F.2d 1147 (6th Cir. 1980), demonstrates that Congress did not intend the URA to change well-known and long-settled common law rules governing utility relocations.

---

[8] *See,* Sipes and McCoid, "Recovery of Consequential Damages in Eminent Domain," 48 VA. L. REV. 437 (1962). In fact, similar language is found in the House Report accompanying the legislation: " . . . [t]he result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs." H. REP. No. 1656, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5850, 5851. The purpose of the legislation was explained as " . . . provid[ing] a humanitarian program of relocation payments . . . and other assistance to owners and tenants displaced from their homes, farms and places of business." *Id.*, 1970 U.S. CODE CONG. & AD. NEWS at 5852.

Respondent has not been able to prove that Congress intended to provide relocation assistance to utility companies pursuant to the URA. Therefore, the rule of construction that there may be no statutory abrogation of the common law absent a clear and explicit expression of such legislative intent must be applied to defeat respondent's claim.[9] Respondent's task to demonstrate such legislative intent is a heavy burden:

> . . . The case for inferring intent is at its weakest where, as here, the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 16-17 (1981) (emphasis in original).

In *Pennhurst,* this Court reaffirmed that a determination that states have agreed to comply with federally imposed conditions rests on whether those conditions had been knowingly and voluntarily accepted:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously . . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

---

[9] *See, Robert C. Herd & Co., Inc. v. Krawill Machinery Corp.,* 359 U.S. 297, 301-302 (1959); *Shaw v. Merchants' National Bank of St. Louis,* 101 U.S. 557, 565 (1880); *Fairfax's Devisee v. Hunter's Lessee,* 11 U.S. (7 Cranch) 603, 623 (1812).

Id. at 17 (citations omitted).

The canon requiring a clear expression of legislative intent ". . . applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 25. The protection afforded to the states as a result of invoking this rule of construction in *Pennhurst* is equally warranted for the Norfolk Redevelopment and Housing Authority, and therefore similarly situated state political subdivisions nationwide, in the instant case. As this Court noted in *Pennhurst:*

> . . . The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice. In this case, Congress fell well short of providing clear notice . . . . Though Congress' power to legislate under the Spending Power is broad, it does not include surprising participating States with post-acceptance or "retroactive" conditions.

Id. at 25.

Interpretation of the URA a dozen years after its enactment as applying to utility companies precluded under state law from claiming relocation costs could be catastrophic for local governments, which generally have not planned for such expenses.[10] In addition, requiring

[10]In a recent survey of NIMLO members, summarized herein at Appendix A, many of the responses indicated concern that claims that may be made by utility companies, if the Fourth Circuit decision is upheld, would burden the financial resources available for desirable and essential public projects. This survey, though limited by time restrictions, demonstrates that throughout the country, state law generally requires utility companies to pay their own costs of

reimbursement of utility relocation costs could force a change in the traditional agreements for use of public rights-of-way by utility companies. In order to recoup the expenses attendant to requesting utilities to relocate, local governments may be compelled to seek legislative approval to charge rent or fees for the use of public rights-of-way.

B. Subsequent congressional actions and policy reasons are contraindicative to the extension of relocation benefits to utility companies.

The URA and conforming state legislation are not intended as creating or removing elements of damage in the law of eminent domain as developed in the states. *Creative Displays, Inc. v. South Carolina Highway Dept.*, 272 S.C. 68, 71, 248 S.E.2d 916, 919 (1978). The scope of the URA has been analyzed in relation to other enactments of Congress, especially the Federal-Aid Highway Act of 1958, 23 U.S.C. § 123 (1976). A persuasive analysis of the interplay of these two statutes can be found in *Artesian Water Co.*

---

relocating from public rights-of-way. In addition, thirty-eight of the responses reported specific amounts for utility relocation claims that have been made or may be expected in those jurisdictions. The amount of total potential liability for such costs in those jurisdictions able to assign values to the claims ranged from $4,000.00 to $3,500,000.00. The average aggregate value of claims reported by these thirty-eight jurisdictions was $351,269.76. Projecting this average over the local governments that could anticipate claims being made if the Fourth Circuit decision is upheld, the total additional costs of projects undertaken for the public health and welfare would be very large. Clearly such a financial burden should not be lightly passed on to the already strained budgets of local governments, of which there are approximately 40,000 nationwide, exclusive of school and special districts. INTERNATIONAL CITY MANAGEMENT ASSOC., THE MUNICIPAL YEAR BOOK 1982 (1982).

v. State Dept. of Highways & Transportation, 330 A.2d 432 (Super. Ct.), *affirmed as modified,* 330 A.2d 441 (Del. 1974):

> . . . The point to be made here is that the U.R.A. did not alter the prior scheme insofar as those "persons" who are entitled to benefits are concerned, but rather the procedure for and the extent of coverage to be had for those "persons" thereby qualifying under the Act. Artesian's contention that the U.R.A. expanded on the class of persons entitled to coverage to include all utilities is therefore an unwarranted interpretation of the Act. Consequently, while the U.R.A. was not intended to afford less protection or assistance to persons displaced under the Federal-Aid Highway Act, . . . neither does it extend coverage to include utilities within its definition of displaced persons or businesses. Moreover, to construe the U.R.A. in absolute terms, as including utilities within its applicable provisions, would undoubtedly render nugatory Section 123 of the Federal-Aid Highway Act. . . .

Id. at 438 (citation omitted).[11]

Congress itself acknowledged that utilities are not necessarily included within the meaning of "displaced persons" under the URA by adopting post-URA legislation, in its role as the District of Columbia's final legislative authority before the District of Columbia was granted

[11]In affirming the lower court, the Supreme Court of Delaware agreed with the superior court's "learned discussion" on the effect of federal and state relocation statutes, 330 A.2d at 442. However, the Delaware Supreme Court also found reimbursement of relocation expenses to be precluded by the operation of applicable franchise contracts.

home rule powers. This post-URA legislation provides reimbursement to utilities required to relocate from District of Columbia public rights-of-way as a result of urban redevelopment. District of Columbia Public Utilities Reimbursement Act of 1972, Pub. L. 92-495, 86 Stat. 812 (Oct. 14, 1972).

Furthermore, reason dictates that the meaning of "displaced persons" under the Uniform Relocation Act cannot be unlimited. Extending the definition to include investor-owned utility companies would force local governments to commit a disproportionate amount of public funds to assist utilities in relocation, even though the utilities do not have any real property interest in the land affected by governmental action.[12] Such a requirement is clearly counterproductive to the purposes of such public-oriented efforts as the urban redevelopment project involved in the instant case. The possibilities become even more absurd where relocation benefits are not limited to investor-owned utilities, but may be claimed by public utilities operating in several independent jurisdictions. In such a case, one governmental entity might be compelled to pay relocation costs to a separate governmental entity, a result that could be very hard to explain to local taxpayers.

Finally, armed with a right to claim relocation benefits pursuant to the Uniform Relocation Act, utilities could then adopt a selective approach to claiming relocation benefits. With this tactic, the utility companies could ensure the success of projects which by their nature would result in high usage redevelopment, and the abandonment of other kinds of development, such as low-income housing.

---

[12] *See, Shepard v. Dept. of Community Corrections*, 293 Or. 191, 205, 646 P.2d 1322, 1329 (1982).

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully submits that the decision rendered by the United States Court of Appeals for the Fourth Circuit in this case should be reversed.

Respectfully submitted,

HENRY W. UNDERHILL, JR.
City Attorney
600 East Trade Street
Charlotte, North Carolina 28202

BENJAMIN L. BROWN
City Solicitor
101 City Hall
Baltimore, Maryland 21202

J. LAMAR SHELLEY
City Attorney
48 North Macdonald Street
Mesa, Arizona 95201

JOHN W. WITT
City Attorney
202 C Street
City Administration Building
San Diego, California 92101

ROY D. BATES
City Attorney
City Hall
P.O. Box 147
Columbia, South Carolina
29217

GEORGE AGNOST
City Attorney
206 City Hall
San Francisco, California 94102

JAMES B. BRENNAN
City Attorney
800 City Hall
Milwaukee, Wisconsin 53202

MARVA JONES BROOKS
City Attorney
Department of Law
2000 Fulton National Bank Bldg.
Atlanta, Georgia 30303

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111

DOUGLAS N. JEWETT
City Attorney
Tenth Floor, Law Department
Municipal Building
Seattle, Washington 98104

ANALESLIE MUNCY
City Attorney
1500 Marilla, 7 BN
Dallas, Texas 75201

WALTER M. POWELL
Municipal Counselor
309 Municipal Building
Oklahoma City, Oklahoma
73102

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
100 Church Street
Room 6A-11
New York, New York
10007

WILLIAM H. TAUBE
Corporation Counsel
Indiana Avenue and Oak Street
Kankakee, Illinois 60901

WILLIAM I. THORNTON, JR.
City Attorney
101 City Hall Plaza
Durham, North Carolina 27701

MAX P. ZALL
City Attorney
City & County Building
Denver, Colorado 80202

CHARLES S. RHYNE,
Counsel of Record
JOAN L. KAYAGIL
1000 Connecticut Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 466-5420

Attorneys for National Institute of Municipal Law Officers as Amicus Curiae

April 1983

APPENDIX

The following is a summary of a survey of NIMLO's membership of their understanding of the current status of the law applicable in their states and local governments regarding the payment of the costs of utilities required to relocate from public rights-of-way. Should respondent ultimately prevail in the instant case, the decision might serve as a catalyst for a multiplicity of claims involving past and present projects. These projects would include, among others, highway projects, airport improvements, street resurfacing program activities supported by Community Development monies, Urban Development Action Grants, and several traditional urban renewal projects. The information gathered from NIMLO members concerning specific amounts of claims is necessarily more difficult to compile than expressions of recognition and concern for the financial problems created for local governments; because of the past ability to generally forestall such claims, the potential amount of future claims that can already be foreseen cannot be accurately calculated. In addition, other municipal attorneys express a concern about the potential impact of the Fourth Circuit decision even though they do not yet know of any possible future projects that may be affected by this holding.

The number of responses to the NIMLO survey was limited because of the short time within which the members were asked to return the responses. It is believed, however, that the survey represents a fair national sampling of the status of the law governing utility relocation costs and claims expected if the Fourth Circuit decision is upheld.

JURISDICTION	Utilities required to pay relocation costs	Claims Expected if 4th Cir. upheld
ALABAMA		
Gadsden	X	X
ALASKA		
Juneau	X	
Kenai		X
ARIZONA		
Glendale	X	
Mesa		X
Tempe	X	
Tucson	X	
Yuma	X	
ARKANSAS		
Fayetteville	X	
CALIFORNIA		
Alameda	X	
Anaheim	(Municipally Owned)	
Burbank	X	X
Carlsbad	X	
Claremont/Laverne	X	X
Clovis	X	X
Compton	X	
Concord	X	
Davis	X	
Escondido	X	
Eureka	X	X
Fresno	X	X
Fullerton	X	
Glendale	X	X
Huntington Beach	X	X
Lodi	X	
Long Beach	X	X
Los Angeles	X	
Mountain View	X	X
Oakland	X	X
Palm Springs	X	
Pittsburg	X	X
Roseville	X	

Salinas	X	X
San Bernardino	X	X
San Buenaventura	X	X
San Diego	X	X
San Francisco	X	
San Jose	X	
San Leandro	X	X
Santa Cruz	X	X
Santa Fe Springs, Commerce & Duarte	X	
South San Francisco	X	X
Thousand Oaks	X	X
Torrance	X	
Watsonville	X	
COLORADO		
Aurora	X	X
Boulder	X	
Denver	X	
Englewood	X	X
Greeley	X	X
Lakewood	X	
Montrose	X	X
Sterling	X	X
CONNECTICUT		
Milford	X	X
DELAWARE		
Dover	X	
DISTRICT OF COLUMBIA		X
FLORIDA		
Belle Glade	X	X
Cocoa Beach	X	
Daytona	X	X
Hialeah	X	
Maitland	X	
North Miami	X	
North Port	X	
Orlando	X	
Pensacola	X	
Plant City	X	
Titusville	X	

GEORGIA		
Columbus	X	
Cordele		X
Gainesville	X	X
HAWAII		
Honolulu	X	
IDAHO		
Coeur D'Alene	X	
Lewiston	X	
Moscow	X	X
Pocatello	X	X
ILLINOIS		
Barrington		X
Bloomington	X	
Crystal Lake		X
Danville	X	
Decatur	X	X
Elgin	X	
Hanover Park	X	X
Kankakee	X	
Lake Bluff	X	
Niles	X	X
Pekin	X	
Peoria		X
Urbana	X	
Wilmette	X	
INDIANA		
Beech Grove	X	X
Indianapolis	X	X
IOWA		
Ames	X	
Cedar Rapids	X	X
Council Bluffs	X	
Davenport	X	X
Sioux City	X	X
Spencer	X	

KANSAS		
Hutchinson	X	
Olathe	X	X
Overland Park	X	X
Shawnee	X	X
Wichita	X	
KENTUCKY		
Louisville	X	
Owensboro	X	X
Versailles		X
LOUISIANA		
Monroe	X	
MAINE		
South Portland	X	
MARYLAND		
Baltimore	X	X
Cumberland	X	X
Harford County	X	
Prince George's County		X
MASSACHUSETTS		
Cambridge		X
MICHIGAN		
Ann Arbor	X	
Grand Rapids	X	
Jackson	X	X
Lansing	X	X
Norton Shores	X	X
Southfield	X	
Traverse City	X	X
Wyoming		X
MINNESOTA		
Brooklyn Park	X	X
Rochester	X	
MISSOURI		
Ferguson	X	X
Hannibal	X	X
Liberty	X	
Saint Charles	X	X
Saint Louis	X	
Springfield	X	X

NEBRASKA		
Grand Island		X
Kimball	X	
Lexington	X	
Omaha	X	X
Scottsbluff	X	X
NEVADA		
Las Vegas	X	
Reno	X	X
NEW JERSEY		
Atlantic County	X	
Jersey City	X	
Newark	X	X
Ridgewood	X	
Teaneck	X	X
Trenton	X	
NEW MEXICO		
Hobbs	X	
NEW YORK		
Albany	X	
Freeport	X	
Fulton	X	X
Lockport	X	X
New Rochelle	X	
NORTH CAROLINA		
Burlington	X	
Carrboro	X	X
Charlotte		X
Durham	X	
Greensboro	X	X
Raleigh		X
Winston-Salem	X	
OHIO		
Akron	X	X
Cincinnati	X	
Dayton	X	
Kettering	X	X
Maumee	X	
Shaker Heights	X	
OKLAHOMA		
Bethany		X
Oklahoma City		X

OREGON		
Deschutes County		X
Estacada	X	
Medford	X	
Pendleton	X	
Portland	X	X
Salem	X	X
Springfield	X	
Tigard	X	X
PENNSYLVANIA		
Allentown	X	
Philadelphia	X	X
SOUTH CAROLINA		
Charleston	X	X
Columbia	X	
Spartanburg	X	X
SOUTH DAKOTA		
Aberdeen		X
Sioux Falls	X	
TENNESSEE		
Chattanooga	X	X
Jackson	X	X
Memphis	X	
Murfreesboro	X	X
Smyrna	X	X
TEXAS		
Arlington	X	
Beaumont	X	X
Bellaire	X	X
Big Spring	X	X
Dallas	X	
Farmers Branch	X	
Grand Prairie	X	
Plano	X	
San Antonio	X	X
Texarkana	X	
UTAH		
Murray City	X	X
Salt Lake City	X	X
VERMONT		
Montpelier	X	X

VIRGINIA		
Alexandria	X	X
Chesapeake	X	
Fairfax	X	
Fairfax County	X	X
Hampton	X	X
Richmond	X	X
Roanoke	X	X
Suffolk	X	X
Virginia Beach	X	X
York County	X	X
WASHINGTON		
Bellevue	X	
Kent	X	X
Tacoma	X	X
Vancouver	X	
Yakima	X	
WISCONSIN		
Eau Claire	X	
Madison	X	X
Sheboygan		X